
General Counsel's Supplemental Report

January 1, 2002 – April 8, 2002

Public Employment Relations Commission

Robert E. Anderson
General Counsel

Don Horowitz
Deputy General Counsel

Appeals From Commission Decisions

Representation Cases

In *City of Newark and Association of Government Attorneys*, D.R. 2000-11, review den., P.E.R.C. No. 2000-100, 26 *NJPER* 289 (¶31116 2000), aff'd 346 *N.J. Super.* 460 (App. Div. 2002), the Court affirmed an order certifying a negotiations unit of the City's lower-level staff attorneys. It upheld the agency's showing of interest rules and practice and rejected claims that attorneys cannot organize because of the Rules of Professional Conduct and because they are confidential employees or managerial executives.

Unfair Practice Cases

In *City of Somers Point and Mainland PBA #77 and April Van Daley*, P.E.R.C. No. 2002-45, ___ *NJPER* ___ (¶_____ 2002),

motion for leave to appeal pending, the Commission declined to stay an unfair practice hearing based on the employer's argument that a pending court action involved related CEPA and EEO claims. The employer then unsuccessfully sought an emergency stay from the Appellate Division.

Other Court Cases

Grievance Arbitration

1. Decisions Confirming Awards

In *Green v. City of Long Branch*, App. Div. Dkt. No. A-3400-00T1 (2/19/02), the Appellate Division panel confirmed a grievance arbitration award requiring the employer to pay \$86,000 to one former employee and \$100,000 to another former employee given a contractual provision mandating payment for accumulated sick time on retirement. Holding that the arbitrator's

contractual interpretation was reasonably debatable, the Court rejected an argument that the arbitrator did not properly consider public policy and fiscal concerns.

2. Other Arbitration-Related Decisions

In *EEOC v. Waffle House, Inc.*, ___ U.S. ___, 122 S. Ct. 754, 151 L. Ed.2d 755 (2002), the United States Supreme Court held that an arbitration agreement between the employer and a disabled grill operator did not bar the EEOC from filing a discrimination claim under the Americans with Disabilities Act. The EEOC was not a party to that agreement so it could seek victim-specific relief such as back pay, reinstatement, and damages.

In *Barker v. Brinegar*, 346 N.J. Super. 558 (App. Div. 2002), the Court declined to hold that an arbitration award was entitled to collateral estoppel effect in a personal injury suit against an insurer for unpaid medical bills. A similar result was reached in *Pace v. Kuchinsky*, 347 N.J. Super. 202 (App. Div. 2002).

Strikes & Penalties

In *Magnolia Bd. of Ed. and Magnolia School Ed. Ass'n*, App. Div. Dkt. No. A-3117-00T1 (2/20/02), an Appellate Division panel

vacated a \$60,000 fine imposed against the MSEA for a four-day strike, but affirmed an attorney's fee award of \$987 to the Board.

The trial court had imposed a fine against the MSEA of \$5,000 for each day teachers and custodians were on strike, but did not properly consider the MSEA's ability to pay such fines as required by R. 1:10-3. The MSEA showed that it had a negative net worth and expected a net loss for the next year and that the NJEA had not agreed to pay any fines imposed against the MSEA. The trial court, however, held that the affront to the judicial system outweighed the effect of the fines on the MSEA. It added:

The minuscule \$15,000 a day didn't even work. Didn't work. So how can you say it's excessive?

The Appellate Division reversed the \$60,000 in fines against the MSEA, reasoning that the object of a civil proceeding under R. 1:10-3 is not to inflict punishment, but to compel compliance. The fines were improperly imposed retroactively to cover the first three days of the strike; did not take into account the MSEA's ability to pay; and were improperly based on the concept that any sanction that did not work cannot be characterized as excessive. The Court, however, upheld the award of attorney's fees

for a hearing which was strike-related and which was necessitated by the MSEA's not having its witnesses present at an earlier hearing.

Compensation

In *Rawitz v. Essex Cty.*, ___ *N.J. Super.* ___ (App. Div. 2002), the Court held that an assistant county counsel was not entitled to be paid under *N.J.S.A.* 40A:9-6 at a section chief's salary rate even though he did many of the duties of a section chief who had been terminated. The assistant county counsel did not meet the statutory requirement of having "held" the "office or position" on a de facto basis; neither he nor anyone else had held him out to be a section chief or an acting section chief.

Tenure

Merlino v. Borough of Midland Park, 338 *N.J. Super.* 436 (App. Div. 2001), discussed in the annual report, has been reversed. ___ *N.J.* ___ (2002). The Court holds, in an opinion by Justice LaVecchia, that a construction official did not become tenured under *N.J.S.A.* 52:27D-126(b) when he was appointed to a second four-year term after a ten-day break in service. The Borough and the official negotiated a deal calling for a

second appointment without tenure. Justice Long wrote a dissenting opinion joined by Justices Stein and Zazzali.

In re Tenure Hearing of Vitacco, 347 *N.J. Super.* 337 (App. Div. 2002), held that a superintendent forfeited his job as of the date of his conviction for filing false federal income tax returns and other charges. Given this automatic forfeiture, the Commissioner of Education properly denied the superintendent a tenure hearing.

Exempt Firemen's Tenure Statute

Roe v. Borough of Upper Saddle River, 336 *N.J. Super.* 566 (App. Div. 2001), and *Viviani v. Borough of Bogota*, 336 *N.J. Super.* 578 (App. Div. 2001), certif. granted 167 *N.J.* 572 (2001), are discussed in the annual report. The New Jersey Supreme Court has approved the analysis in *Roe* and reversed *Viviani*, 179 *N.J.* 452 (2002) Justices Verniero and Zazzali wrote dissenting opinions, joined by Justice Long. The majority's opinion permits an employer to abolish positions for reasons of economy so long as its declared objective is not a pretext for terminating or demoting a particular employee.

Family Leave

In *Ragsdale v. Wolverine World Wide, Inc.*, ___ U.S. ___ (2002), the United States Supreme Court invalidated a Department of Labor regulation issued to implement the Family Medical Leave Act of 1993. The regulation prohibits counting a leave of absence against the FMLA entitlement to 12 weeks of leave unless an employer timely notifies an employee it will be so counted. The Court reasoned that this regulation effectively required an employer to grant more than the 12 weeks of leave mandated by the FMLA as a minimum benefit.

Pensions and Retiree Health Benefits

In *Inganamort v. Police and Firemen's Retirement System*, App. Div. Dkt. No. A-2542-00T5 (2/19/02), a PFRS decision excluded from pension calculations the extra compensation (8% of base salary) called for by a collective agreement and paid to police officers for assuming positions as "training officers" after 24 years of service. The PFRS concluded that the duties required by that position were illusory and the payments constituted individual salary adjustments granted primarily in anticipation of retirement.

An Appellate Division panel affirmed, relying on *Wilson v. PFRS Bd. of Trustees*, 322 N.J. Super. 477 (App. Div. 1998). The Court also rejected a claim that the training officer clause was protected by the grandfather provision of N.J.A.C. 17:4-4.1.

Discrimination Claims

In *Communications Workers of America v. New Jersey Dept. of Personnel*, ___ F.3d ___, 2002 U.S. App. LEXIS 2875 (3d Cir. 2002), the Court enforced an agreement between CWA as a national union and DOP settling an EEOC charge that DOP's PAR program had a disparate impact upon African-American and Hispanic employees. The Court held that a CWA local that had not filed an EEOC charge itself could not contest the settlement agreement and that the national union was estopped from challenging the existence of the agreement.

In *Constantino v. Borough of Berlin*, ___ N.J. Super. ___, 2002 N.J. Super. LEXIS 117 (App. Div. 2002), the Court dismissed a lawsuit claiming that the employer discriminatorily refused to hire a police officer over the age of 35. N.J.S.A. 40A:14-127 prohibits hiring police officers over the age of 35. At the time the plaintiff applied for a position, however, the federal law against age

discrimination overrode this state law. Subsequently, Congress revitalized a previous provision that had permitted states to use age as a criterion in hiring police officers and firefighters. The Court ruled that this subsequent permission retroactively covered plaintiff's situation.

Tartaglia v. Paine Webber, Inc., ___N.J. Super.__(App. Div. 2002), reversed a trial court order requiring a plaintiff in a discrimination suit to destroy copies of illegally obtained information and enjoining its use at trial. New Jersey's judicial philosophy in civil cases favors the search for truth at trial and generally requires that the misconduct of obtaining records illegally be remedied through other means than suppressing evidence. The defendants were not prejudiced because they would have produced the documents anyway pursuant to a discovery order.

Disciplinary Issues

In *Coyle v. Warren Cty. Freeholder Bd.*, ___N.J.__(2002), our Supreme Court held that the Rule of Professional Conduct requiring an attorney to withdraw from representation when discharged by a client does not apply to a County counsel who has a statutory term of office and statutory

protection against termination without good cause. Citing a California Supreme Court case upholding the right of government attorneys to join unions, the Court stated that the rule does not apply to government lawyers. The Court's analysis is consistent with *City of Newark v. Association of Government Attorneys*, described on p. 1 of this report.

Right to Representation

In *South Jersey Catholic Teachers Org. v. Diocese of Camden*, 347 N.J. Super. 301 (Chan. Div. 2000) (approved for publication in 2002), Judge Gibson upheld the right of lay teachers in two Catholic schools to choose new bargaining representatives after a contract between their employer and a previous union expired.

Forfeiture of Public Employment

In *Flagg v. Essex Cty. Prosecutor*, ___N.J.__(2002), the Supreme Court addressed the standard for reviewing a county prosecutor's decision not to apply for a waiver of the forfeiture provision of N.J.S.A. 2C:51-2 when an employee has been convicted of a disorderly or petty disorderly persons offense. The prosecutor must review each request case-by-case and not abuse his or her discretion in denying a request. The Attorney General is to

issue guidelines for seeking waivers. Under the facts presented, the Court concluded that the refusal to seek a waiver abused the Acting Prosecutor's discretion.

CEPA Claims

In *Hancock v. Borough of Oaklyn*, 347N.J. Super. 350 (App. Div. 2002), the Court dismissed CEPA claims filed by two police officers. The Court found no cognizable acts of retaliation; neither officer was discharged or demoted and the allegations of retaliation had no impact on their pay or rank.

In *Gerard v. Camden Cty. Health Services Center*, ___ N.J. Super. ___, 2002 LEXIS 115 (App. Div. 2002), an Appellate Division panel reversed a grant of summary judgment against a CEPA plaintiff. Plaintiff, an assistant director of nurses at a health center, refused a superior's request to serve disciplinary charges upon a nurse. The trial court found that the disciplinary charges did not actually violate a law, regulation or public policy; but the appellate court disapproved that standard and retreated from previous cases which had required a CEPA plaintiff to establish that an employer had violated a law or regulation or clear mandate of public policy or engaged in fraudulent or criminal conduct.

Instead, it suffices if a plaintiff can show that he or she had an objectively reasonable belief that the conduct complained of was fraudulent or criminal. The assistant director introduced sufficient evidence that she could have reasonably believed that the charges were fraudulent and violative of the proper quality of patient care under N.J.S.A. 34:19-3c(1).

In *Dzwonar v. McDevitt*, ___ N.J. Super. ___, 169 LRRM 2584 (App. Div. 2002), the Court held that the federal Labor-Management Reporting and Disclosure Act preempted CEPA claims by union employees whose sole allegations involved LMRDA violations rather than crimes.

Immunity

In *Brown v. City of Bordentown*, ___ N.J. Super. ___, 2002 N.J. Super. LEXIS 25 (App. Div. 2002), an African-American police sergeant claimed that the City and the police commissioner discriminatorily hired a white man rather than the sergeant as police chief. The Appellate Division panel held that the City was not entitled to absolute immunity because the commissioner was its agent for administrative or executive activities. It remanded for a hearing on whether the commissioner was acting in an administrative or executive capacity, and thus subject to

liability himself, or whether he was acting as a legislative capacity, and thus immune from suit.

too much power to unions to determine how many employees would take leaves.

Statutes

The Legislature has amended *N.J.S.A.* 11A:6-10, a statute determining which police officers and firefighters are entitled to take paid leaves of absence to attend union conventions. The statutory right to attend conventions is now limited to duly authorized representatives of majority representatives affiliated with the New Jersey Policemen's Benevolent Association, the Fraternal Order of Police, the Firemen's Mutual Benevolent Association, or the Professional Fire Fighters Association of New Jersey. The amendment deletes several other organizations from the approved list. It also limits the number of employees entitled to take leaves and the number of days (seven) for such leaves. This amendment was apparently enacted in response to *New Jersey State FMBA v. North Hudson Reg. Fire & Rescue*, 340 *N.J. Super.* 577 (App. Div. 2001), certif. den. 170 *N.J.* 88 (2001), which had declared that *N.J.S.A.* 11A:6-10 was unconstitutional because it constituted special legislation and delegated